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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1387

THE COLONNADE CATERING CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. I) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1969. The petition for a writ of certiorari was filed on May 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

26 U.S.C. 5146(b) provides:

> Entry of premises for inspection.—The Secretary or his delegate may enter during busi-

ness hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept by such dealer on such premises.

26 U.S.C. 7606(a) provides:

Entry during day.—The Secretary or his delegate may enter, in the daytime, any building or place where any articles or object subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects.

26 U.S.C. 7342 provides:

Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of section 7606 (relating to entry of [illegible]mises for examination of taxable articles) or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit $500.

26 U.S.C. 5[illegible]2(a) provides:

Retail dealer in liquors.—When used in this chapter, the term "retail dealer in liquors" means any dealer, other than a retail dealer in beer or a limited retail dealer, who sells, or offers for sale, any distilled spirits, wines, or beer, to any person other than a dealer.

26 U.S.C. 5301(c) provides in pertinent part:

> Refilling of liquor bottles.—No person who sells, or offers for sale, distilled spirits, or agent or employee of such person shall—
>
> (1) place in any liquor bottle any distilled spirits whatsoever other than those contained in such bottle at the time of stamping under the provisions of this chapter; or
>
> (2) possess any liquor bottle in which any distilled spirits have been placed in violation of the provisions of paragraph (1); or
>
> (3) by the addition of any substance whatsoever to any liquor bottle, in any manner alter or increase any portion of the original contents contained in such bottle at the time of stamping under the provisions of this chapter; or
>
> (4) possess any liquor bottle, any portion of the contents of which has been altered or increased in violation of paragraph (3);
>
> * * * * *

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction over the government's appeal.

2. Whether agents of the Internal Revenue Service, acting under the express authority of 26 U.S.C. 5146(b) and 7606(a), could, consonant with the Fourth Amendment standard of reasonableness, inspect without a warrant the business premises of a corporation holding a federal retail liquor dealer's occupational tax stamp and seize illegally refilled liquor bottles.

STATEMENT

The facts are undisputed and are set out in the opinion of the court of appeals (Pet. App. 2a–4a). Petitioner is incorporated under the laws of the State of New York, is licensed by the State to serve alcoholic beverages, and holds a federal retail liquor dealer's occupational tax stamp as required by 26 U.S.C. 5121(a).

On Saturday afternoon, May 18, 1968, at approximately 4:00 p.m., three Special Investigators of the Internal Revenue Service Alcohol and Tobacco Tax Division, accompanied by a Nassau County policeman, entered petitioner's place of business, a catering establishment, at which a party was in progress. Their purpose was to determine whether petitioner possessed any liquor bottles that had been refilled or altered, which would constitute a violation of both federal and State law. One of the agents had attended a party on these premises during the previous week and had observed what he believed were rescaled bottles of liquor.

With the consent of the banquet manager, the agents observed for a time the activity in the ballroom where liquor was being served. They then commenced an inspection of the basement of the building in the course of which they informed the banquet manager that they wished to enter a locked liquor storeroom approximately seventy-five feet from the ballroom entrance. The manager told the agents that petitioner's president, Mr. Rozzo, was the only person

with authority to unlock the door. Upon being summoned to the scene, Mr. Rozzo refused to do so and instead asked the agents whether they had a search warrant. He was told by the area supervisor of the Alcohol Tax Unit (who had been called to the premises by the other agents) that no search warrant was required to permit inspection of the storeroom. When Mr. Rozzo persisted in his refusal to unlock the door, the agents broke the lock, entered the storeroom and seized two funnels and fifty-three bottles of liquor which had been refilled in violation of 26 U.S.C. 5301(c).

Petitioner filed in the United States District Court for the Eastern District of New York a petition under Rule 41(e), F. R. Crim. P., for the return of the property seized and its suppression as evidence. The district judge, after a hearing, granted the petition, holding that under this Court's decisions in *Camara* v. *Municipal Court*, 387 U.S. 523, and *See* v. *City of Seattle*, 387 U.S. 541, the search of the storeroom (which the court characterized as an area sought to be preserved as private under *Katz* v. *United States*, 389 U.S. 347) was invalid under the Fourth Amendment because of the lack of a search warrant (Pet. App. II). The government appealed to the court of appeals, invoking in that court as statutory authority for the appeal the provisions of 18 U.S.C. 3731, as amended by Title VIII of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 237. The court of appeals reversed the judgment of the District Court, holding that *Camara* and *See* do not

preclude the narrow liquor searches authorized by Congress under 26 U.S.C. 5146(b) and 7606(a) (see *supra*, pp. 1–2), and that one who engages in the highly regulated business of a liquor dealer may reasonably be required to permit an inspection of his business premises during regular business hours by Internal Revenue agents without a warrant (Pet. App. I).

ARGUMENT

1. Although no issue of appealability was raised below, petitioner apparently questions the jurisdiction of the court of appeals in this case (Pet. 22–23). Petitioner points out correctly that the provisions of 18 U.S.C. 3731, relied on to confer jurisdiction below, are inapplicable because, *inter alia*, no criminal charges were or are pending against petitioner in connection with the liquor seized in this case.[1] It is clear, however, that the court of appeals had jurisdiction over the government's appeal pursuant to 28 U.S.C. 1291, which provides: "The courts of appeals

[1] Insofar as here pertinent, 18 U.S.C. 3731 (Supp. IV) provides:

* * * * *

> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> * * * * *
>
> From an order, granting a motion for return of seized property or a motion to suppress evidence, made before the trial of a person charged with a violation of any law of the United States, if the United States attorney certifies to the judge who granted such motion that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of the charge pending against the defendant.

shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court." The federal courts have consistently held that where, as here, no criminal charge is pending and no other preliminary action such as the filing of a complaint or an arrest has taken place, a judgment of a district court ordering the return of property as wrongly seized is an appealable "final decision" within the meaning of Section 1291. *E.g., Selinger* v. *Bigler,* 377 F. 2d 542 (C.A. 9), certiorari denied, 389 U.S. 904; see *DiBella* v. *United States,* 369 U.S. 121, 131–132. The fact that all parties and the court below believed the appeal was authorized under 18 U.S.C. 3731 rather than 28 U.S.C. 1291 is, of course, not dispositive and did not deprive the court below of jurisdiction. See *United States* v. *Filing* (No. 18938, C.A. 6, decided May 15, 1969, slip op., p. 3).

2. The court of appeals properly held, after exhaustive consideration, that the inspection and seizure by the Internal Revenue agents in this case was lawful. It correctly distinguished *Camara* and *See, supra,* which required search warrants for housing and fire-code inspections pursuant to broad grants of authority under local ordinances. Here, in contrast, Congress has narrowly defined the scope of the liquor business inspection by Internal Revenue agents which is permitted without a search warrant. The occupation involved is one which Congress has subjected to close control and inspection since the found-

ing of the Republic.[2] The sole authority granted, insofar as is relevant here, is permission to enter the premises of a liquor dealer during business hours and inspect any distilled spirits kept on such premises. See 26 U.S.C. 5146(b), 7606(a). An inspection of such limited scope and purpose, which the agents in this case did not exceed, is hardly comparable, as petitioner suggested, to a general or exploratory "search".

There are additional critical differences between this case and *Camara* and *See*. Unlike the situation there, a warrant is hardly necessary in order to advise liquor dealers of the lawfulness and limits of the inspection authority. Congress was dealing with persons in a heavily regulated and controlled industry, who may fairly be presumed to be familiar with the agents' right to inspect (see Pet. App. 9a–10a). Furthermore, the court below suggested that the requirement of a warrant might allow some illicit dealers in alcohol to frustrate the deterrent aim of the inspection statutes by affording them an opportunity to destroy evidence of their violations (Pet. App. 12a). For all these reasons, the court below properly held that the statutory scheme here is significantly different from those involved in *Camara* and *See* and that the decisions in those cases do not require invalidation of the reasonable regulatory provisions at issue here.

In addition, as the court below alternatively held (Pet. App. 12a–14a), the federal statutes authorizing

[2] See Act of March 3, 1791, Sec. 26, 1 Stat. 199, 205–206, granting to supervisors of revenue the right to inspect distilleries. See, also, Act of July 24, 1813, Sec. 5, 3 Stat. 42, 43–44, which appears to be a precursor of the present statutory scheme.

the inspection and seizure in this case may be sustained on the principle, which this Court and others have recognized,[3] that one who enters a highly regulated business, such as that of a dealer in liquor, in effect "submits himself to statutory authority to the extent of permitting warrantless inspection of alcoholic beverages on his business premises" (Pet. App. 13a). He cannot validly contend that he has a reasonable expectation of freedom from governmental intrusion in his liquor storage space. Compare *Katz* v. *United States,* 389 U.S. 347; *Mancusi* v. *DeForte,* 392 U.S. 364. And if the reasonableness of such a regulatory technique must be resolved "on a case-by-case basis" (*See* v. *City of Seattle, supra,* 387 U.S. at 545–546), this case is a clear one, involving a precise and limited inspection authority, similar to that granted in a warrant (see Pet. App. 11a), over a business which has been closely regulated since this nation was formed.

The fact that the agents in this case used force to break the lock on petitioner's storeroom did not invalidate the search. The force used was the minimum necessary to enable the agents to achieve entry and was employed only after the final refusal of petitioner's president, who was informed of the agents' lawful authority to inspect the liquor, to unlock the door. As the court below held (Pet. App. 15a):

[3] See *Zap* v. *United States*, 328 U.S. 624, vacated on other grounds, 330 U.S. 800; *Davis* v. *United States*, 328 U.S. 582; *Shapiro* v. *United States*, 335 U.S. 1; *Peeples* v. *United States*, 341 F. 2d 60 (C.A. 5), certiorari denied, 380 U.S. 988; *Ray* v. *United States*, 374 F. 2d 638 (C.A. 5), certiorari denied, 389 U.S. 833.

> There would be no point in holding warrantless searches by alcohol tax inspectors to be reasonable if the owner of the premises could render them unreasonable by withholding his consent and compelling the agent to use the minimum amount of force necessary to accomplish his objective.[4]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1969.

[4] *United States* v. *Frisch*, 140 F. 2d 660 (C.A. 5), relied upon by petitioner as being in conflict with the instant decision (Pet. 11), is readily distinguishable since the incriminating material in that case was found as the result of a search of living quarters separate from the business premises of the defendant in the downstairs portion of the building.

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